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No. 97-1396

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,

v.

MONTEREY COUNTY, CALIFORNIA, STATE OF CALIFORNIA, *Appellees*,

and

WENDY DUFFY, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF ON THE MERITS FOR APPELLANTS

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21 pp

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Table of Contents

Table of Authorities

Cases

State Constitutional Provisions and Statutes

Federal Statutes

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Argument

Appellee State of California is unable to refute Appellants' plain language argument that the Voting Rights Act requires preclearance whenever a §5-covered jurisdiction alters its voting practices. Instead, Appellee raises an undisputed and unremarkable issue -- that the State of California is not a §5-covered jurisdiction. The relevant §5 issue, however, focuses not on the State but solely on the covered county and whether

its voting practices, regardless of their legislative source, have changed. Because it is undisputed that Monterey County's voting practices have changed, the changes are subject to §5.

The Congressional formula which initially triggered §5 coverage of Monterey County supports this plain language position and undermines the State's argument that the County's voting changes are exempt from preclearance because they are mandated by state law. That formula subjected certain counties to §5 precisely because those jurisdictions were administering a literacy test that was mandated by state law.

The State's mantra-like references to the fact that it is not a §5-covered jurisdiction are made to bolster the specious claim that application of §5 in this case would impermissibly intrude on the State's sovereignty. But issues of state sovereignty and the Tenth Amendment present no bar to this Court's holding that §5 applies to the voting changes that have occurred in the §5-covered County, regardless of whether those changes may have been initiated by the non-covered State. *See State of South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (Congress's express powers under Fifteenth Amendment authorize §5 enforcement against designated jurisdictions).

Finally, even if this Court decides that state statutes effecting voting changes in covered jurisdictions are not subject to preclearance, the County's antecedent ordinances that initially effected those voting changes remain subject to preclearance. As such, the countywide judicial election scheme may not be implemented unless and until those ordinances are precleared.

I. Section 5's Plain Language Mandates That, Whenever A Voting Change Is To Take Effect In A Covered Jurisdiction, It Must First Be Submitted For Preclearance.

A. A Plain Language Reading Of Section 5 Does Not Limit Its Coverage To Legislation "Initiated" By Monterey County.

The State's "plain language" argument flatly misstates the actual wording of §5: "According to the Act's plain language, federal preclearance is required *only as to voting changes initiated by an identified covered jurisdiction*. . . ." State Appellee's Brief 16 ("State's Br.")(emphasis in original). The State is quite persistent in its effort to insert the term "initiate" into the language of §5. *See* State's Br. 20, 21, 22, and 24. But §5 simply requires that whenever a covered jurisdiction "shall enact or seek to administer any [voting change]," preclearance is required. And as Appellants have demonstrated, regardless of whether Monterey County "initiated" the change, this covered jurisdiction unquestionably "seeks to administer" a voting change.

While the term "administer" may include voting changes initiated by the covered jurisdiction, its plain language can in no way be restricted to such changes. A county "administers" voting changes that it initiates and also "administers" changes initiated by a superior jurisdiction. California law reflects this plain language interpretation of "administer." Under California law, when a state statute mandates certain elections to be conducted at the county level, the county official is directed to "administer that election." California Government Code § 74784(b); *see also* Appellants' Opening Br. 37 (other state statutes employing identical language). So, "administer" clearly encompasses county officials' implementation of voting changes mandated by state law, and any attempt to restrict its meaning to exclude such actions belies the plain meaning of §5.

But the State insists that Congress's use of the term "'seek to administer,' rather than simply 'administer,' further compels the conclusion that the covered jurisdiction" must be exercising

some discretion in administering the change; thus, according to the State, when such discretion does not exist and the change is mandated by a superior jurisdiction, preclearance is not required. State's Br. 24 n.17. The State's attempt to ascribe to the word "seek" a meaning that somehow implicates the exercise of discretion must fail. The State can point to no definition of "seek" that refers in any way to the exercise of discretion.[1]

To the contrary, this Court has stated that in the 1975 legislative extension of §5, Congress specifically intended "to provide some mechanism for coping with all potentially discriminatory enactments whose *source* and forms it could not anticipate . . . ." *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 47 (1978) (emphasis added); *see also Foreman v. Dallas County*, 117 S.Ct. 2357, 2358 (1997) (citing 42 U.S.C. § 1973c) (§5 applies to county's actions "whether taken pursuant to a statute or not"). Accordingly, in its first opinion in this case, this Court referred to §5's requirements in a manner wholly supportive of Appellants' "plain language" approach:

> A jurisdiction subject to §5's requirements must obtain either judicial or administrative preclearance before *implementing* a voting change. *No new voting practice* is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance.

Lopez v. Monterey County, 117 S.Ct. 340, 347 (1996) (emphases added) (citations omitted).

As demonstrated in Appellants' opening brief, §5 cannot be rewritten to impose a requirement that preclearance be

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[1]"[S]eek to" is a temporal reference. It refers simply to the requirement that, *prior to* administering the change, the jurisdiction must obtain preclearance.

obtained only when a covered jurisdiction "initiates" a new voting practice.[2] Section 5's plain language mandates that preclearance be obtained not only when a covered jurisdiction "enacts" or initiates a new practice but when, as here, it "seeks to administer" a voting change. The Voting Rights Act, and Congress's intent in enacting §5, demand no less.

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[2]While, given this plain language interpretation, the Court need not examine legislative history, an examination of the relevant Congressional debates reveals a fully consistent legislative intent. *See* Appellants' Opening Br. 12-29. The State challenges the reliability of this history because it refers to statements made by opponents of the Voting Rights Act. State's Br. 43-45. But this Court has found value in statements made by opponents of legislation because such statements can offer evidence of Congress's knowledge of the potential scope of legislation. *United States v. Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 130-131 (1978) (*Sheffield*). And when those statements reflect an awareness that state legislation would be subject to §5 in only certain counties within a state, their relevance herein is manifest.

In its 1982 extension of §5, Congress similarly was aware that, as reflected in this Court's decisions, *see Gaston County v. United States*, 395 U.S. 285 (1969) and *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), statewide laws in North Carolina and New York were being subjected to §5 in only certain political subdivisions within those states. Thus, in its reenactment of §5 without change, Congress ratified this prevailing interpretation. *Cf. Sheffield*, 435 U.S. at 131-135 (relying on Congressional ratification of longstanding interpretation of §5).

B. The State Fails To Acknowledge That A State Statute, Over Which Monterey County Exercised No Discretion, Precipitated The Initial §5 Designation Of The County.

In enacting and reauthorizing the Voting Rights Act, Congress subjected jurisdictions such as Monterey County to §5 requirements in part because the County "maintained," *pursuant to State policy*, a literacy test for voting. *See* 42 U.S.C. 1973b(b). This provision (§4) of the Act not only contains the coverage formula for determining which jurisdictions are subject to §5's preclearance requirements but also suspended literacy tests in counties implementing such state laws. 42 U.S.C. § 1973b(a). Appellants previously demonstrated this linkage between §4 (42 U.S.C. § 1973b) and §5 (42 U.S.C. § 1973c), *see* Appellants' Opening Br. 10-12, yet the State fails to address this salient point.

In designating jurisdictions such as Monterey County for §5 coverage, Congress chose not to exempt these political subdivisions on the basis that the county administered the literacy test solely because it was mandated to do so by State policy. Rather, §5 would "apply in any State or in any political subdivision of a state" in which the above-cited factor was present and the formula applied. 42 U.S.C. § 1973b(b).

Neither Congress, in its subsequent reenactments of the Voting Rights Act, nor this Court, in its holding that Monterey County's ordinances were subject to §5, have ever questioned the propriety of the County's initial designation as a §5-covered jurisdiction. Indeed, the State of California has never contested the designation of Monterey County as a §5-covered jurisdiction on the basis that the County maintained its literacy test only because it was mandated to do so by state law.

Yet the State now claims that Appellants' plain language interpretation "would yield truly bizarre and paradoxical results" because the State's statutes would be subject to preclearance only in California's four §5-covered counties. State's Br. 47. But the principles underlying what the State calls "bizarre and paradoxical results" are virtually identical to those that Congress already contemplated when it subjected only four of California's counties to §5 on the basis that the State maintained a statewide literacy test. *See* 42 U.S.C. § 1973b(b). The State similarly criticizes Appellants' interpretation as creating a "patchwork" scenario.[3] State's Br. 47. In doing so, the State apparently ignores the fact that Congress also initially suspended those literacy tests in only certain local jurisdictions within uncovered states, a "patchwork" suspension that was approved by this Court in *Gaston County v. United States*, *supra*.

Thus, with regard to the pending statutory construction issue, the application of §5 to a covered jurisdiction even if its voting change was the result of an enactment by a superior jurisdiction is entirely consistent with this overall statutory scheme of §5. And this Court's duty is "'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress

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[3]But, in enacting the §5 coverage formula, Congress recognized that statewide laws would impact minority voting rights more profoundly in certain counties, such as those that suffered from low voter registration or participation rate. *See* 42 U.S.C. § 1973b(b). A state law mandating at-large county election systems, for example, might have a retrogressive effect on minority voters in only such counties. Congress appropriately devised a formula that resulted in the designation of only those counties, and not the entire state, for §5 coverage.

manifested.'" *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (citation omitted); *see also Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose.") (citations omitted). Simply stated, a political subdivision became subject to §5 because it "maintained" a literacy test (even if mandated by state law), 42 U.S.C. § 1973b(b), and any voting changes (even if mandated by state law) it "seeks to administer" are similarly subject to §5. This reading plainly offers the most "harmonious" interpretation of §5.

Contrary to these established canons of statutory construction, the State's argument defies §5's plain language and undermines a harmonious reading of the statute. The State would have this Court hold that, at the same time Congress *designated* Monterey County for §5 coverage because it administered a literacy test which was mandated by state law, Congress *exempted* the County's voting changes from §5 coverage as long as the changes were mandated by state law. This strained reading of the statute must be rejected.

II. Construing Section 5 In Accordance With Its Plain Language And Congressional Intent Poses No Tenth Amendment State Sovereignty Concerns.

The Voting Rights Act was enacted pursuant to Congress's authority under the Fifteenth Amendment which was "specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980). Finding §5 of the Act to be constitutional, this Court held that "Congress had the authority

to regulate state and local voting through the provisions of the Voting Rights Act." *Id.* at 179-180.

In an earlier ruling upholding the constitutionality of §5 against a challenge that it impermissibly intruded upon state sovereignty, this Court held:

> [T]he [§5] coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies on the few remaining States and political subdivisions covered by the formula . . .

Katzenbach, 383 U.S. at 330.

This coverage formula, of course, subjects political subdivisions to §5 on the basis of a test implemented pursuant to a state statute.[4] 42 U.S.C. § 1973b. Thus, the constitutionality of subjecting voting changes in a covered jurisdiction to §5 due to statutory action taken by an uncovered superior jurisdiction has already been decided. Consequently, contrary to Appellee's assertions, State's Br. 28-34, Appellant's plain language construction of §5 would not impermissibly impinge on the State's sovereign powers.

The State nonetheless complains that application of §5 to state statutes administered by covered counties improperly

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[4]Political subdivisions such as Gaston County, North Carolina and Monterey County, California became subject to §5 on the same basis. *See* Appellants' Opening Br. 11-12 n.9. North Carolina and California mandated implementation of statewide literacy tests. The fact that the counties had no discretion in implementing the tests mandated by a superior jurisdiction posed no barrier to the counties' designation as §5-covered jurisdictions. *See Gaston County*, 395 U.S. at 287.

impinges on its sovereignty. But by similarly imposing §5 not on an entire state but only on certain political subdivisions implementing statewide literacy laws, Congress established a direct federal regulation of those covered counties. *See* 42 U.S.C. § 1973b(b). And that method of regulation is constitutional. *Katzenbach, supra.* It defies reason to now suggest that a related Congressional directive to a political subdivision of the state -- federal preclearance of a state law implemented in a covered county -- that closely mirrors the coverage formula already found constitutional, would be deemed unconstitutional. The only improper governmental interference herein is the State's attempt to insert itself between Congress and the §5-covered counties and act as a shield against preclearance requirements.

Appellees also insist that because the State is an "innocent" party, application of §5 to state statutes administered by covered jurisdictions is constitutionally impermissible because the State has no available "bailout" relief. State's Br. 31-33. Appellees once again attempt to distract from the relevant §5 issue which focuses not on the State but on the covered jurisdiction and whether voting changes are being made within that jurisdiction. If the covered jurisdiction believes that §5 should no longer apply, that jurisdiction may seek "bailout" relief. 42 U.S.C. § 1973b(a). This scenario, in which an "innocent" jurisdiction may be affected by §5 yet denied "bailout" relief, has been upheld as statutorily mandated and as a constitutionally permissible regulation of state and local government voting practices. *City of Rome, supra.*

The State's arguments, although couched as Tenth Amendment issues of state sovereignty, really amount to a complaint that since the State has not acted in a discriminatory manner, it is unfair to subject the implementation of its statutes in covered counties to §5 preclearance. But, as Monterey County points out, it was the counties' implementation of the

state's literacy test statute that caused them to be designated as §5-covered jurisdictions. *See* Appellee County Br. 2-3. Thus, while §5 enforcement may affect the State's prerogatives in the covered counties, that is the natural, necessary, and constitutionally-permissible consequence of requiring preclearance of "any" voting changes in the covered jurisdictions.

III. Even If State Legislation Effecting A Voting Change In A §5-Covered County Is Not Subject To Preclearance, Antecedent County Ordinances That Initially Effected Those Voting Changes Remain Subject To Preclearance.

In a gross misreading of §5 precedent, the State argues that its superseding statutes have rendered moot the §5 requirement that county ordinances establishing the county-wide judicial election system are subject to preclearance.[5] State's Br. 11-15. This Court already has found that these county consolidation ordinances created the "single, county-wide municipal court." *Lopez,* 117 S.Ct. at 344. And while various state statutes also were directed at the County's judicial system, several of these laws actually "reflected changes . . . resulting from the consolidation process." *Id.* Finally, this Court held that,

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[5]The State does concede that a covered jurisdiction is subject to §5, even when its voting change is mandated by a superior jurisdiction, so long as the covered jurisdiction exercises discretion in the implementation of the change. State's Br. 12-13. The State also concedes that the County exercised discretion when it enacted its consolidation ordinances. State's Br. 4 n.3. Thus, this Court need only determine whether an intervening, unprecleared State law can moot or cure prior violations of §5.

despite the preclearance of the 1983 state statute, the antecedent consolidation ordinances are subject to but "do not appear to have received federal preclearance approval." *Id.* at 345. Thus, even if the 1979 statute is not subject to preclearance because of its legislative source, the county-wide system nonetheless cannot be implemented until the antecedent County ordinances have been precleared.

This notion that "superseding" changes in state law obviate the need for preclearance of underlying changes effected by the covered jurisdiction is unsupported by the plain language of §5 and this Court's precedents. Appellants' Opening Br. 40-46. As previously noted, the mandate to secure preclearance is "a continuing one," cannot be cured or rendered moot by subsequent voting changes, and "arises anew each time" a voting practice that incorporates the unprecleared voting changes is to be implemented. *Dotson v. City of Indianola*, 514 F. Supp. 397, 401 (N.D. Miss. 1981), *aff'd* 456 U.S. 1002 (1982). Monterey County must not be rewarded for delaying its preclearance obligations for so long that the State subsequently enacted legislation that incorporates the changes initially effected by the County's ordinances. Otherwise, the County's failure to comply with §5 would transform its violation into a successful defense against a §5 enforcement action.

City of Monroe v. United States, 118 S.Ct. 400 (1997), provides no mooring for the State's contention that the unprecleared 1979 "superseding" state legislation moots the County's obligation to preclear its prior ordinances. *See* State's Br. 12-13. The Court there held that the preclearance of a majority-vote default rule in a statewide election code precleared the use of majority voting in the City of Monroe, which had no law specifying a method of election. *City of Monroe*, 118 S.Ct. at 402. This Court reasoned that the state's preclearance submission had given the Attorney General "an adequate opportunity to determine the purpose of the [default-

rule] electoral changes and whether they will adversely affect minority voting" anywhere in the state. *Id.*

Monroe does illuminate, therefore, the applicable precedent governing when a *precleared* state statute can operate to preclear a local voting change or ordinance. The preclearance of state legislation serves to preclear local voting changes only when the "superseding" state legislation refers to such local laws "'in an unambiguous and recordable manner.'" *City of Monroe*, 118 S.Ct. at 402 (quoting *City of Rome, supra*).

Thus, applying the rule gleaned from *Monroe* and *Rome*, the 1979 statute could not possibly have "superseded" or "mooted" Monterey County's obligations under §5, since that statute was never submitted for preclearance. The only related state law which has been precleared is the 1983 statute which referred to the consolidation of the final two justice courts. *Lopez*, 117 S.Ct. at 344. But all parties agree that the submission of the 1983 statute for preclearance to the Attorney General did not "identify or describe any of the County's previous consolidation ordinances." *Id.* at 345. Therefore, under *Monroe*, the submission of the 1983 statute could not possibly have put the Attorney General on notice of the effect of the consolidation ordinances on minority voters in Monterey County, and consequently, the ordinances remain subject to preclearance.

The State also overstates the holding in *Young v. Fordice*, 117 S.Ct. 1228 (1997), by contending that this Court held "that a covered jurisdiction is not required to preclear voting changes imposed by superior powers unless local discretion is retained and exercised." State's Br. 24. The State argues that this holding "appears to fully answer the question presented in this appeal." *Id.* But the State's contentions are seriously flawed for two reasons.

First, the State overlooks a crucial distinction -- *Young* involved a covered jurisdiction's implementation of *federal* law and, in that context, preclearance may not be necessary if the jurisdiction has no discretion as to how it may implement that federal law. *Young*, 117 S.Ct. at 1239. The rationale for exempting a state's ministerial implementation of federal law -- that Congress already has had the opportunity to assess whether the voting change is retrogressive -- does not apply to a law enacted by a state rather than by Congress. *See Perkins v. Matthews*, 400 U.S. 379, 394 (1971) (holding that county's voting change was subject to §5 despite fact that change was mandated by state law and county "had no choice but to comply with the [state] statute.").

Second, *Young* distinguished between changes mandated by federal law and those that "are not purely ministerial but reflect the exercise of policy choice and discretion by [state] officials." *Young*, 117 S.Ct. at 1236. "It is the discretionary elements of the new federal system that the State must preclear." *Id.* at 1239. Thus, assuming *arguendo* that *Young's* "purely ministerial" rule applies to preclearance of *any* superseding law, not simply federal law, Monterey County was accorded significant discretion under the 1979 statewide statute incorporating the court consolidations. That state statute did not define the boundaries of the new consolidated judicial districts. Those boundary changes were defined by unprecleared county ordinances. Appellants' Opening Br. 41-42. Moreover, this Court acknowledged that the "at-large, county-wide system" which, in part, was incorporated into the 1979 statute, "'reflect[ed] the policy choices' of the County." *Lopez*, 117 S.Ct. at 348 (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981)). Given this finding, even the broadest possible reading of *Young* cannot insulate Monterey County from its §5 obligations.

Conclusion

In upholding the constitutionality of §5 of the Voting Rights Act, this Court expressed its concern that delays in effective enforcement of §5 should not inure to the benefit of the covered jurisdictions: "After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Katzenbach*, 383 U.S. at 328. In a later decision, affirmed by this Court, the same principle was articulated:

> Recognizing that the Attorney General could not keep track of changes relating to voting being made, Congress put the burden on the covered jurisdictions to seek preclearance to avoid the very problem we now face. We would do violence to the heart of section 5 if we were to excuse the [covered jurisdiction's] failure to seek preclearance merely because the [jurisdiction] has been disregarding section 5 for a long time.

Brooks v. State Board of Elections, 775 F. Supp. 1470, 1481 (S.D. Georgia 1989), *aff'd* 498 U.S. 916 (1990). Monterey County's consolidation ordinances and all applicable state statutes were, and remain, subject to §5 preclearance requirements. As this Court previously admonished: "The requirement of federal scrutiny should be satisfied without further delay." *Lopez*, 117 S.Ct. at 349.

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